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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. D. 20548**

**FILE:** B-197400

**DATE:** December 10, 1981

**MATTER OF:** Thomas C. Collins - Improper Appointment

**DIGEST:** Individual was terminated from employment with the Forest Service after appointment was found to be erroneous, was reemployed temporarily in lower-graded position after break in service, and was then properly appointed to original position. He claims compensation and other benefits. For period of employment prior to termination claimant is entitled to compensation earned, lump-sum payment for accrued annual leave, service credit for annual leave accrual purposes, recredit of accrued sick leave to his leave account and payment for retirement deductions withheld. No entitlement exists to backpay for period after termination of original appointment since neither termination nor appointment to temporary lower-graded position constitutes unwarranted or unjustified personnel action under Back Pay Act, 5 U.S.C. § 5596. Entitlement to service credit for retirement is for determination by Office of Personnel Management.

This is in response to a request from Mr. Brad Womack, an authorized certifying officer with the National Finance Center, United States Department of Agriculture, for an advance decision concerning the claim of Mr. Thomas C. Collins. The issue in this case is whether Mr. Collins should be compensated as if he were a GS-9 for the period he was improperly appointed at that grade and for the period he was subsequently separated until proper reappointment to the GS-9 position. We hold that Mr. Collins may receive annual and sick leave benefits for the periods of employment and a refund for his retirement contributions made while he was employed, but his other claims for backpay are denied.

Mr. Collins was appointed by the Salmon National Forest, Department of Agriculture, as a Wildlife Biologist, GS-9, on April 8, 1979. The appointment was found to be improper soon after he entered on duty. At the time he was initially hired on April 8, 1979, the selecting official believed that Mr. Collins was eligible for reinstatement due to previous employment with the U.S. Postal Service. In a letter accompanying his application for the position, Mr. Collins reported that the Office of Personnel Management (OPM) Regional Office in Cheyenne, Wyoming had informed him that he appeared to be eligible for reinstatement. However, officials at the Salmon National Forest received Mr. Collins' Official Personnel Folder after his appointment was effective, and discovered that his employment with the Postal Service was temporary rather than career-conditional. The Personnel Officer at the Salmon National Forest wrote to OPM and was informed that Mr. Collins did not have reinstatement eligibility. Mr. Collins was terminated on June 20, 1979, but on July 1, 1979, he was appointed to a temporary GS-7 Wildlife Biologist position. After he had served two weeks in that position, the Forest Service determined that Mr. Collins was within reach on an OPM register, and he was properly given a career-conditional appointment to the GS-9 Wildlife Biologist position on July 15, 1979.

Mr. Collins states that the above described events occurred through no fault of his own and caused him to lose compensation and other benefits which he would have received had he been properly appointed in the first place. He claims a lump-sum payment of 22 hours for accrual of annual leave for the period from April 8, 1979, to July 1, 1979. He also claims a lump-sum payment for accrual of sick leave for the same period. Mr. Collins also claims reimbursement for retirement contributions he would have made if he were a GS-9 employee for the period from April 8, 1979, to July 15, 1979. Further, Mr. Collins argues that he is entitled to reimbursement for the delay in the receipt of his step increase as his creditable service for step increase purposes begins on July 15, 1980, and not April 8, 1980, when he was originally improperly appointed. Finally, Mr. Collins seeks the difference between a GS-7 and GS-9 salary for July 1 through July 14, 1979, when he was temporarily appointed as a GS-7. We will rule on each of Mr. Collins' claims in the order in which he has presented them.

As to his claim for annual and sick leave, on August 17, 1977, we issued Victor M. Valdez, Jr. 58 Comp. Gen. 734, in which we set forth a new rule regarding individuals who have received improper appointments as follows:

"\* \* \* in those cases where a person has been appointed to a position by an agency and the appointment is subsequently found to have been improper or erroneous, the new rule is that the employee is entitled to receive unpaid compensation and to credit for good faith service for purposes of accrual of annual leave and lump-sum payment for unused leave upon separation unless--

(1) the appointment was made in violation of an absolute statutory prohibition, or

(2) the employee was guilty of fraud in regard to the appointment or deliberately misrepresented or falsified a material matter."

Mr. Collins' appointment was not in violation of a statutory bar nor is there any evidence that he was guilty of fraud or that he deliberately misrepresented or falsified a material matter in order to receive his appointment. Furthermore, it appears that he served in good faith with no knowledge of the impropriety of his appointment.

In accordance with Valdez, therefore, Mr. Collins is entitled to a lump-sum payment for his accrued annual leave and to service credit for leave accrual purposes for the period of his improper appointment. We have held that employees who are separated and then reemployed by another agency prior to the processing of the lump-sum leave payment may be paid for that portion of leave which expired during the interval between appointments, and have the remaining leave transferred to the new agency. 34 Comp. Gen. 290 (1954). Accordingly, we hold that Mr. Collins is entitled to a lump-sum payment for the

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leave he accrued but did not use from April 9, 1979 to June 20, 1979, the period of his erroneous appointment. This leave would have expired in the interval between Mr. Collins' appointments so that none would have remained to be recredited to his account when he was appointed to the temporary GS-7 position. He has no entitlement to a lump-sum leave payment for the period June 20, 1979, through July 1, 1979, as he was not employed with the Government during that time. In this regard see our holding below concerning backpay.

Mr. Collins is also entitled to a recredit of the sick leave he accumulated but did not use during the period of his erroneous appointment. He is not entitled to a lump-sum payment for sick leave. Paragraph 630.502(s)(1) of Title 5, Code of Federal Regulations (1979) provides that:

"\* \* \* an employee who is separated from the Federal Government or the government of the District of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government or the government of the District of Columbia, without a break in service of more than 3 years."

Just as we held in Valdez that an improperly appointed employee may be considered to have accrued annual leave for purposes of a lump-sum payment, we believe that Mr. Collins may be considered to have accrued sick leave for the purpose of recrediting that leave to his account pursuant to the above-quoted regulation. There is no basis, however, for Mr. Collins to receive any credit for sick leave for the period during which he was not employed by the Forest Service. Therefore, the portion of his claim representing the period from June 20 to July 1 must be denied.

Mr. Collins' third claim is for retirement contributions made during his erroneous appointment and contributions which would have been made if he had been continuously employed in the GS-9 position. It may be that Mr. Collins is entitled to service credit for retirement purposes for the period of his erroneous appointment but matters concerning retirement credit are within the jurisdiction of the Office of Personnel Management. The question of whether Mr. Collins is

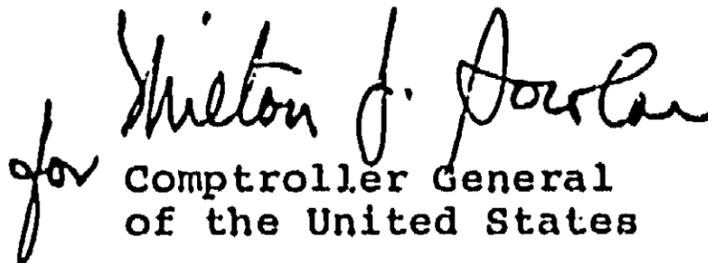
entitled to such credit should be referred to OPM, 5 U.S.C. § 8347(b). If OPM denies service credit for retirement purposes, Mr. Collins would be entitled to a refund of the retirement deductions made from his salary during the period of the erroneous appointment, less any necessary social security deductions. See 57 Comp. Gen. 565 (1978).

However, Mr. Collins' claim for the retirement deductions that would have been made had he been a GS-9 for the period he was not employed and the period when he was employed in the GS-7 position cannot be allowed. Mr. Collins is requesting that he be treated as if he were a GS-9 throughout this period. It should be remembered that Mr. Collins was initially improperly appointed to the GS-9 position and his entitlement to payment for this period extends only because he provided the Government with his services. Valdez, supra. There is no basis on which Mr. Collins may be paid for retirement contributions he did not make.

Mr. Collins' claim with regard to his step increase and his claim for the difference between GS-7 salary and GS-9 salary for the period of July 1 to July 15 are similar in nature to his claim for retirement deductions which would have been made if he were a GS-9. He would be entitled to service credit and to that difference in salary only if the GS-9 appointment could be made retroactive. This is not possible. Mr. Collins' entitlement to a retroactive appointment would exist only under the Back Pay Act, 5 U.S.C. § 5596, and that Act allows retroactive appointments and backpay only where the individual has a vested right to employment status by virtue of statute or regulations. 59 Comp. Gen. 62 (1979) and decisions cited therein. Our Office has permitted such a remedy in situations where an agency has violated a statutory right of reemployment, violated a mandatory policy on effecting appointments without a break in service following retirement, improperly restrained an employee from entering upon the performance of his duties, or violated a nondiscretionary policy to appoint attorneys and law clerks at a certain grade level. See 54 Comp. Gen. 1028 (1975); B-181223, July 29, 1974; B-175373, April 21, 1973; and B-158925, July 16, 1968.

In this case, when the Forest Service violated the regulations in appointing Mr. Collins, it did not take away a benefit to which he was entitled, but rather it granted him one to which he was not entitled at that time. Similarly, Mr. Collins had no right to be retained after OPM advised the Forest Service that he did not have reinstatement eligibility. Although the Forest Service could have requested OPM to grant a variation under section 5.1(b) of Civil Service Rule V, there is no requirement that an agency do so, and there is no certainty that OPM would have granted such a variation.

Accordingly, the Back Pay Act does not apply in Mr. Collins' case and as a result, there is no basis upon which Mr. Collins' reappointment may be made retroactive. When Mr. Collins was appointed to the GS-7 position he had no right to any other position at the time and he was entitled only to the salary of the position to which he was appointed. Dianish v. United States, 183 Ct. Cl. 702 (1968). Mr. Collins is therefore not entitled to the pay of the GS-9 position for other than the period when he was serving under the initial appointment and from the date he was properly reappointed to that position.

*for*   
Comptroller General  
of the United States